BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JANET COLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,788
MARTIN LUTHER HOMES OF KANSAS INC.	)	
Respondent	)	
	)	
and	)	
	)	
EMPLOYERS INS. OF WAUSAU MUTUAL CO.	)	
Insurance Carrier	)	

ORDER

Claimant appealed the February 19, 2002 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board placed this case on its summary docket for decision without oral argument.

Appearances

Steven R. Wilson of Wichita, Kansas, appeared on behalf of claimant. Douglas C. Hobbs of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier.

Record and Stipulations

The Appeals Board (Board) has considered the record and adopted the stipulations listed in the February 19, 2002 Award and the April 3, 2001 Settlement Hearing.

Issues

This is a post-award request for medical treatment. This claim was settled by running award at a Settlement Hearing held on April 3, 2001. The Special Administrative Law Judge awarded claimant permanent partial disability compensation based upon a 14 percent scheduled injury to the right leg for a December 7, 1998 work-related injury.

Claimant now contends that she needs additional medical treatment and such treatment is directly related to the December 1998 accident. But, after conducting a December 13, 2001 hearing and reviewing the January 7, 2002 deposition of orthopedic surgeon Kenneth A. Jansson, M.D., and the medical reports and records that had been made exhibits to the record, Judge Frobish denied claimant's request for additional medical benefits.

> The Claimant's severe degenerative arthritis is not a result of her medial meniscus tear. The only medical opinion in this case is that the Claimant's meniscus tear was the only knee condition attributable to the work-related injury and that the Claimant's arthrosis was preexisting with a possible minor exacerbation. The Claimant's deterioration in this matter would have occurred absent the primary injury, and is, therefore, not compensable. The Claimant's request for additional medical treatment is denied.

Claimant contends Judge Frobish erred. Claimant argues that Dr. Jansson opined that her degenerative condition had been aggravated by the work-related knee injury. Accordingly, claimant requests the Board to reverse the Judge and order respondent to provide additional treatment.

Conversely, respondent contends the denial of additional medical benefits should be affirmed.

The only issue before the Board on this appeal is whether claimant has proven a direct relationship between her need for additional medical treatment and her December 7, 1998 work-related accident.

Findings of Fact and Conclusions of Law

The Workers Compensation Act places the burden of proof upon claimant to

establish her right to an award of compensation and to prove the conditions on which that right depends.[1] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true that not true on the basis of the whole record."[2] The Act is to be liberally construed to bring employers and employees within the provisions of the Act but those provisions are to be applied impartially to both.[3]

When the primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[4] It is not compensable, however, where the worsening or new injury would have occurred even absent the primary injury or where it is shown to have been produced by an independent intervening cause.[5] Causal relation is a necessary element in establishing liability under a workers' compensation claim, and it cannot be presumed but must be proven by a preponderance of evidence.[6]

The only medical evidence concerning the relationship between claimant's current work-related injury and her current need for treatment is that of Dr. Jansson. Although at one point Dr. Jansson attributed 95 percent of the claimant's need for the total knee replacement surgery to her preexisting osteoarthritis, and five percent to her work-related trauma, he equivocated and never stated this apportionment opinion was to a reasonable degree of medical probability.

> Q. (Mr. Hobbs) Okay. In that letter, the last paragraph, you indicated that you thought at least 95 percent of the total knee replacement would be preexisting.
>
> A. Yes.

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[1] K.S.A. 44-501(a): *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 44-508(g). *See also In re Estate of Robinson,* 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 44-501(g).

[4] *Jackson v. Stevens Well Service,* 208 Kan. 637, 493 P.2d 264 (1972).

[5] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997); *Stockman v. Goodyear Tire & Rubber Co.,* 211 Kan. 260, 505 P.2d 697 (1973). *See also Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 924 P.2d 1263, *rev. denied* 261 Kan. 1082 (1996).

[6] *See Drake v. State Dept. of Social Welfare*, 210 Kan. 197, 499 P.2d 532 (1972).

Q. Why is that?

A. Oh, I'm just picking a number out of thin air. I mean, I think the vast majority is preexistent. I think that frequently, patients will say their knee wasn't bothering them that much until they had a work injury, and I will give some accounting to the fact that something changed at the time of the work injury according to the patient's history. So that's why I would allow 5 percent for that. But clearly, there's nothing else that I can see that would have caused that at the time of her injury.

Q. If this lady had not had the work-related injury in '98, would she still have required a total knee replacement?

Mr. Wilson: Let me just object. It calls for the doctor to speculate especially as to time, date and place that that might be necessary.

Witness: Yes, I think she would have eventually required knee replacement. [7]

Dr. Jansson said claimant would have eventually required knee replacement surgery solely due to the degenerative osteoarthritis, but he could not say when claimant would have needed the knee replacement surgery absent the work-related injury.

Q. (Mr. Wilson) Mr. Hobbs asked you if you had an opinion as to whether or not she would need the total knee replacement regardless of the injury that occurred to her while in the employ of Martin Luther Homes on or about December 7th, 1998, and you answered in the affirmative, you believed that it would have been necessary.

A. (Dr. Jansson) Yes.

Q. Now, can you tell me whether she would have needed that total knee on any particular date?

A. On a particular date, no.

Q. You'd have to speculate, wouldn't you?

A. That's correct.

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[7] Depo. of Kenneth A. Jansson, M.D., p. 14:17 thru p. 15:17 (Jan. 7, 2002).

Moreover, when he was asked whether or not the work-related injury accelerated the need for that surgery, he answered in the negative.

> Q. All right. But you also felt, and you've been consistent throughout the care that you've given her, that while you believe that the vast majority of the condition for which you were providing care was related to her preexisting arthrosis or degenerative condition, that there was some exacerbation - - I think you used the term "exacerbation" during the direct examination - - relating to the work-related injury which she – by history; correct?
>
> A. That's correct.[8]
>
> Q. And without asking you to tell me whether you believe it's 95 percent or 90 percent, you believe that there is some aggravation or acceleration of the condition as a result of the injury by history?
>
> A. No.[9]

The Board finds claimant has failed to prove that the original work related injury more probably than not caused or contributed to her current need for treatment. Based upon the record presented, the Board cannot determine whether claimant's need for a knee replacement surgery was accelerated or otherwise contributed to by the work-related trauma or is instead solely a result of her preexisting degenerative arthritis.[10] Accordingly, the ALJ's finding that claimant's current complaints are not compensable as a direct and natural consequence of the December 7, 1998 work related injury should be affirmed. Post-award medical benefits are denied.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on February 19, 2002, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

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[8] Depo. of Kenneth A. Jansson, M.D., p. 18: 5-25 and p. 19:1-3 (Jan. 7, 2002).

[9] Depo of Kenneth A. Jansson, M.D., p. 19:4-9 (Jan. 7, 2002).

[10] *See Frazier v. Mid-West Painting, Inc.*, 268 Kan. 353, 995 P.2d 855 (2000); *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 121, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

Dated this _____ day of July 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director